SUPREME COURT, U. S.

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No. 442

In the Supreme Court of the United States

OCTOBER TERM, 1970

VICTOR J. OSBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A18) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1970. A petition for rehearing with suggestion for rehearing *en banc* was denied on July 1, 1970. On July 24, 1970, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

402-071—70

QUESTIONS PRESENTED

1. Whether petitioner had immunity from prosecution under Section 22(c) of the Securities Act of 1933 (15 U.S.C. 77v(c)) based on an examination by the Securities and Exchange Commission of records of a corporation with which he was associated.

2. Whether pre-indictment delay deprived petitioner of a speedy trial or otherwise resulted in any prejudice to petitioner.

3. Whether inclusion of the *Allen* charge in instructions to the jury constituted reversible error.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of nine counts charging larceny after trust in violation of 22 D.C. Code 2203.[1] On January 3, 1969, he was sentenced to imprisonment for three to nine years on each count, the sentences to run concurrently. The court of appeals affirmed. (Pet. App. A1–18).

The evidence, involving intricate financial transactions between petitioner, an attorney, and the American Province of the Sisters of the Divine Savior, which resulted in the conversion of funds belonging to the religious order, is detailed in the opinion below (Pet. App. A1–11) and need not be restated here.

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[1] Petitioner was charged but acquitted on three counts of fraud by wire, on two counts of mail fraud, and on one count of interstate transportation of a security taken by fraud.

ARGUMENT

1. Petitioner contends that he was effectively given immunity from prosecution under 15 U.S.C. 77v(e) based upon examination by the Securities and Exchange Commission of the corporate records of Parkwood, Inc., and affiliated companies, following petitioner's appearance before an Examiner pursuant to a subpoena duces tecum where he "reserved" the privilege against self-incrimination. The argument is wholly unfounded.

The essence of Section 77v(e) is a *quid pro quo* where the witness is granted immunity from prosecution in exchange for testimony or records as to which he possesses a privilege against self-incrimination. It follows that immunity is not afforded a witness on production of records with respect to which he has no Fifth Amendment privilege to assert, as where he acts as agent for a corporation. Here, as the court below properly observed (Pet. App. A 17–18), petitioner was subpoenaed to produce only the records of the corporations with which he was associated, not his own personal records. Under decisions of this Court, he had no right to refuse to produce these records. *United States* v. *White*, 322 U.S. 694, 704–705 and authorities cited; see also *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286; compare *United States* v. *Kordel*, 397 U.S. 1, 8–10. Consequently, their production—whether or not deemed to be coupled with an assertion of a privilege against self-incrimination—did not entitle petitioner to the immunity granted by the

statute. *United States* v. *Abrams*, 357 F. 2d 539, 548–549 (C.A. 2), certiorari denied, 384 U.S. 1001.

Nothing in *Edwards* v. *United States*, 312 U.S. 473, relied on here by petitioner (Pet. 13–14), is to the contrary. There, unlike the present case, the defendant alleged in his pleadings that after having claimed his privilege against self-incrimination before an officer of the S.E.C., he "under compulsion, testified under oath, pursuant to various questions propounded and asked him" concerning his identity and relationship to the various trusts and organizations which were the subject matter of the prosecution. *Id.* at 475.

2. Petitioner also contends that he was denied the right to a speedy trial by an allegedly unnecessary pre-indictment delay of five years. As the court below noted, however, the "prosecution of the appellant resulted from an extended investigation into the complicated and tangled affairs of the appellant and his corporations. There is no suggestion of any purposeful or otherwise improper delay in the conduct of the investigation, nor is there any showing of prejudice * * * caused by the delay" (Pet. App. A18). In these circumstances, it is plain that no constitutional right was violated. See, *e.g.*, *Tynan* v. *United States*, 376 F. 2d 761 (C.A.D.C.), certiorari denied, 389 U.S. 845; *United States* v. *Lee*, 413 F. 2d 910 (C.A. 7), certiorari denied, 396 U.S. 1022; *United States* v. *Feinberg*, 383 F. 2d 60 (C.A. 2), certiorari denied, 389 U.S. 1044.[2]

[2] In *United States* v. *Marion*, D.D.C., Crim. No. 672–70, the court dismissed an indictment because of a pre-indictment delay of two and a half years. The government has noted a direct appeal to this Court.

3. Petitioner argues that the giving of a supplemental "Allen" charge constituted reversible error. He relies on *United States* v. *Johnson*, No. 23,168, C.A.D.C., decided on June 19, 1970 (after the decision below), in which the panel reviewed the "Allen" instruction and made a suggestion for consideration *en banc* of the instruction as presently approved in *Fulwood* v. *United States*, 369 F. 2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934. The court in *Johnson* indicated that some modification might be appropriate in the exercise of the court's supervisory power. As we have pointed out in a number of recent briefs in opposition, however, although some federal courts have adopted prospective modifications of the standard "Allen" charge, none has held that the fact it was given constitutes reversible error. See *United States* v. *Wynn*, 415 F. 2d 135 (C.A. 10), certiorari denied, 397 U.S. 994; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017; *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837. There is thus no conflict among the circuits. See also *Kawakita* v. *United States*, 343 U.S. 717, 744, affirming 190 F. 2d 506 (C.A. 9). Even if the District of Columbia Circuit ordered a modification of the "Allen" instruction in the exercise of its supervisory power—which thus far it has not done—such an action would not warrant further review by this Court. See *Fisher* v. *United States*, 328 U.S. 463, 476–477.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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